

ARTICLE 19

“Don’t Provoke, Don’t Challenge”
The Censorship and
Self-Censorship of the LGBT
Community in Kazakhstan

2015

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Executive Summary

This report examines challenges faced by lesbian, gay, bisexual and transgender (LGBT) people in Kazakhstan when exercising the right to freedom of expression. It is based on pilot research conducted in September 2015, including interviews with LGBT people in six cities of Kazakhstan, analysis of Kazakhstan's domestic legislation and media monitoring.

The findings of the research demonstrate an environment in which expression related to LGBT identities is directly censored – often justified on the grounds of protecting ‘morality’ or ‘traditional values’. At the same time, societal prejudices and a lack of legal protections against discrimination based on sexual orientation and gender identity have created an environment in which LGBT people resort to self-censorship to avoid harassment or even violence.

The situation is further exacerbated by the absence of platforms where LGBT people can publicly express themselves or access relevant information around the issues they face. Despite a few positive examples, media coverage tends to be sensationalist, if not openly homophobic and discriminatory. This has created an atmosphere of distrust between LGBT people and media workers, further reinforcing practices of self-censorship. The situation is compounded by openly homophobic rhetoric propagated by influential public figures, which encourage negative attitudes towards LGBT people.

Censorship restricts the flow of information from and about LGBT people, preventing them from expressing themselves and denying them opportunities to assert other fundamental rights – such as the right to education and the right to health. It also violates the rights of all people to openly discuss issues relating to sexual orientation and gender identity, and prevents them accessing information on a wide range of related concerns. Attempts to justify this on the grounds of protecting children and upholding morality contradict the principles of the universality of human rights. Freedom of Expression is a fundamental human right and cannot be denied to a whole section of the population, due to societal prejudices.

Restrictions on the rights of LGBT people occur against the backdrop of a broader disregard for freedom of expression within Kazakhstan. Despite constitutional guarantees of freedom of expression, this right is repeatedly violated, due to broad, contradictory or simply repressive legislation, a lack of procedural safeguards and an absence of political will.

Ensuring the right to free expression of LGBT people demands the introduction of a variety of measures to tackle intolerance and prejudice on all grounds, and ensure universal equality and non-discrimination. Legislation and judicial practices must be reformed to promote freedom of expression and equality for all, while including an explicit recognition of sexual orientation and gender identity as a protected characteristic. Moreover, the Kazakh authorities must take the lead on rejecting homophobia and transphobia, with public officials demonstrating a firm commitment to respect the principles of equality, tolerance and diversity related to sexual orientation and gender identity.

At the same time, the government must seek to challenge the dominant rhetoric on sexual orientation and gender identity within Kazakhstan, in order to tackle hate speech against LGBT people and facilitate an environment in which LGBT people are able to express the right to freedom of expression. ARTICLE 19 believes that resolving tensions and intolerance related to sexual orientation and gender identity cannot be achieved by suppressing the expression of differences but rather by debating them openly. This requires a series of measures, aimed at promoting more positive discourse on LGBT issues. These should combine positive policy measures, aimed at tackling the root causes of prejudice and intolerance against LGBT people, with the development of a coherent legal framework for prohibiting the advocacy of hatred against LGBT people that constitutes incitement to discrimination, hostility, or violence that nevertheless upholds the fundamental principles of freedom of speech.

It is also essential that LGBT people can rely on the broader support of civil society to promote expression, as part of anti-discrimination networks, challenging intolerance and prejudice on any grounds and promoting the universality and indivisibility of human rights for all people.

Recommendations

The government and parliament of Kazakhstan should:

- Include sexual orientation and gender identity as grounds for protection from discrimination in all legislation, and specify that sexual orientation and gender identity is a ground for prohibition of incitement to hatred in Article 174 of the Criminal Code, while also ensuring that this provision is reformed to prevent its abusive application against minority and dissenting views.
- Refrain from adopting, and also repeal, any laws that discriminate based on sexual orientation or gender identity, including any laws aimed at prohibiting dissemination of information on sexual orientation and gender identity.
- Simplify procedures for gender reassignment treatment and for changing legal gender identity.
- Amend Kazakh legislation to align it with its international obligations to establish a presumption in favour of the exercise of the right to free expression
- Refrain from filtering, blocking, removal and other technical or legal limits on access to content on LGBT identities. Protect against all extra-judicial blocking of online information, and ensure that blocking can only occur on the order of a judicial body in pursuant to a clearly defined law, fully complying with international standards on freedom of expression.
- Create independent equality institutions, with proper financial support, with mandates to develop data collection mechanisms and to promote empirical and other research on discrimination on various grounds, including sexual orientation and gender identity. Any comprehensive policy for tackling inequality, discrimination and other forms of prejudice against LGBT people should be evidence-based.

-
- Organise public information and education campaigns, in collaboration with civil society, to combat negative stereotypes of, and discrimination against, LGBT people. In particular, public information and education campaigns should be integrated into primary, secondary and tertiary education, and complemented with concrete anti-bullying policies, including the provision of support services for victims of bullying, including peer-led initiatives.
 - Encourage media to take an unbiased approach to covering challenges faced by LGBT people, including by offering incentive for this from the The Ministry of Innovation and Development.
 - Provide trainings for public officials and other public figures on the right of LGBT people to equality and non-discrimination. Instruct politicians and other influential people in society on the importance of avoiding statements that might promote discrimination or undermine equality. Develop and adopt ethical codes and “no discrimination” policies for elected officials.

Civil Society Organisations should:

- Respect pluralism and promote the rights to freedom of expression and equality for all people, including on the grounds of sexual orientation and gender identity;
- Develop coalitions of CSOs working on the universality of human rights, to push for legislative change promoting tolerance and non-discrimination, on all grounds, including sexual orientation and gender identity;
- Lead on public information and education campaigns aimed at combating negative stereotypes of LGBT people and promoting and protecting universal human rights;
- Undertake monitoring of incidences of intolerance and prejudice concerning LGBT people and provide data to the government and equality bodies (as established).

Media Organisations should:

- Recognise the moral and social responsibility to promote equality and non-discrimination, including based on sexual orientation and gender identity of media organisations.
- Ensure that workforces are diverse and representative of society as a whole;
- Address as far as possible issues of concern to all groups in society, including LGBT people
- Adopt and implement professional codes of conduct that reflect equality principles Avoiding unnecessary references to sexual orientation or gender identity that may promote intolerance;
- Raise awareness of the harm caused by discrimination and negative stereotyping of LGBT people.

^{NB} Recommendations are largely derived from those included in existing ARTICLE 19 policies, including The Camden Principles, (ARTICLE 19, 2009), <https://www.article19.org/data/files/pdfs/standards/the-camden-principles-on-freedom-of-expression-and-equality.pdf>; Responding to Hate Speech Against LGBT People (ARTICLE 19, October 2013), <https://www.article19.org/data/files/medialibrary/37343/LGBTI-Incitement-Paper-30-Sept-AS-FINAL.pdf> and 'Prohibiting Incitement to discrimination, hostility of violence', (ARTICLE 19, December 2012) <https://www.article19.org/data/files/medialibrary/3548/ARTICLE-19-policy-on-prohibition-to-incitement.pdf>

Introduction

Freedom of expression is a fundamental human right. It is essential for the fulfilment of other human rights, as it is only through being able to inform and express oneself that other rights can be claimed. The right to freedom of expression encompasses the right to freely express one's sexual orientation or gender identity, as well as the freedom to seek, receive and impart information on issues related to sexual orientation or gender identity.

In Kazakhstan, this right is particularly important for lesbian, gay, bisexual and transgender (LGBT) people, who frequently face discrimination, including biased media coverage and homophobic speech, from both public figures and society more broadly, and struggle to access platforms for disseminating the ideas and views of LGBT people. Such discrimination will be only be overcome by ensuring LGBT people are able to express themselves.

This study focuses on challenges faced by LGBT people in Kazakhstan when exercising their right to freedom of expression, looking at the broader societal context concerning the rights of LGBT people. It finds a society where legislative discrimination, societal prejudices, and violence have created an environment in which LGBT people are censored, or resort to self-censorship. It also looks at public discourse about LGBT people and the issues affecting them, finding that distorted and negative discussion and coverage of LGBT people, including the denial of opportunities for LGBT people to be heard, reinforces obstacles to freedom of expression.

The report is based on data collected from interviews with 33 members of the LGBT community, all aged 16 or older: 15 females, 11 males and 7 transgender people. Respondents came from six cities in Kazakhstan: Astana, Almaty, Karaganda,¹ Semey, Ust-Kamenogorsk, and Shymkent. All were interviewed on the condition of anonymity in this publication: pseudonyms are used in the report to protect the anonymity of participants. Research also relied on monitoring of popular media sites, social networks and political speeches, and analysis of Kazakhstan's domestic legislation. Local human rights defenders were also interviewed in free form.

¹ Researchers encountered challenges in conducting the survey in Karaganda. This city has some evidence of civic activism around LGBT issues - in October 2013 local LGBT activists held a pride day in response to an initiative of members of the local town council to ban unconventional sex. However, of 5 planned meetings, all were cancelled last minute. At the last moment only one speaker was found who agreed to talk. This may indicate concerns about speaking with a researcher; however, we were not able to explore these further.

The research is not intended to be comprehensive, but constitutes pilot research on which we hope to build in the future. It includes a limited sample of interviewees from urban areas of Kazakhstan, while monitoring of media relies on a narrow pool of publications, observed over a 6 month time-frame. Nevertheless, it provides an illustration of the challenges faced by LGBT people across the country in exercising their right to freedom of expression.

Defining Freedom of Expression

“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers”

Article 19, Universal Declaration of Human Rights

Article 19 of the UDHR guarantees the right to freedom of expression. This is elaborated upon and given legal force by Article 19 of the International Covenant on Civil and Political Rights (ICCPR), which protects the right of all people to seek, receive, and impart information of any form, including political discourse, commentary on one's own and on public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching, and religious discourse. Importantly, the right protects expression that others may find deeply offensive.*

The right to freedom of expression and information therefore protects the right of all people, including LGBT people, to seek, receive, and impart information on all issues relating to sexual orientation and gender identity.

The Human Rights Committee (HR Committee), the monitoring body for the ICCPR, explicitly stated that this also protects the right to publicly “giv[e] expression to [their] sexual identity and seek [...] understanding for it.”

* General Comment No. 34, HR Committee, CCPR/C/GC/34, 12 September 2011, para. 11
~ Fedotova v. Russian Federation, CCPR/C/106/D/1932/2010, Communication No. 1932/2010, 30 November 2012, para. 10.7

1. Background: LGBT rights in Kazakhstan

“There is no justification ever, for the degrading, the debasing or the exploitation of other human beings – on whatever basis: nationality, race, ethnicity, religion, gender, sexual orientation, disability, age or caste”

Prince Zeid in Ra’ad, United Nations High Commissioner for Human Rights, 2014³

While this report focuses on freedom of expression, the extent of discrimination, harassment, and violence faced by LGBT people is also briefly covered in this chapter, in order to illustrate the environment in which LGBT people are seeking to exercise this right. The magnitude of threats and stigmatisation faced by LGBT people encourages self-censorship, while engendering media coverage and public rhetoric that mirrors and reinforces negative attitudes.

LGBT people in Kazakhstan are subject to significant violations of their rights based on their sexual orientation and gender identity.⁴ Pervasive societal discrimination and harassment is exacerbated by weak legislative provisions around non-discrimination and equality, and a lack of recognition of the grounds of sexual orientation and gender identity. In a context in which ‘sodomy’ was de-criminalised as recently as 1999, statements and actions by the government and other public figures rejecting LGBT identities serve to legitimise stigmatisation of LGBT people, reinforcing societal attitudes. For example, in 2015, Parliament attempted to pass legislation which would prohibit dissemination of information on LGBT issues, under the guise of protecting children (see in Chapter 2), while there have even been calls by some parliamentarians to criminalize homosexuality.⁵

³ Opening Statement by Zeid Ra’ad Al Hussein United Nations High Commissioner for Human Rights at the Human Rights Council 27th Session , Geneva, 8 September, 2014, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14998#sthash.u8qLIQUI.dpuf>

⁴ See for example, Soros.KZ, ‘Unacknowledged and Unprotected: LGBT people in Kazakhstan’, 2009, http://www.soros.kz/uploads/user_67/2013_09_04_04_43_19_269.pdf

⁵ Human Rights Campaign, ‘Kazakhstan Lawmaker Calls for Criminalization of Same-Sex Sexual Activity’, January 2014, <http://www.hrc.org/blog/entry/kazakhstan-lawmaker-calls-for-criminalization-of-same-sex-sexual-activity>

By not ensuring robust protections against discrimination, including for LGBT people, Kazakhstan is failing to meet its obligations under international human rights law to promote and encourage respect for human rights and for fundamental freedoms **for all**.

Violence and Harassment

Despite legislative guarantees against discrimination in Kazakhstan (*see below*), LGBT people in Kazakhstan who provided information for this report reported societal prejudice, leading to harassment, interference into their private lives, and even violence, related to their sexual orientation or gender identity. Where people feel exposed to violence or harassment, there is a high risk they will resort to self-censorship to prevent themselves becoming targets of attack.

There are no accurate statistics available on physical violence against LGBT people in Kazakhstan, since authorities are not required to record such instances as bias-motivated attacks. Victims are also unlikely to report such incidences to the police.⁶ However, there have been several high profile physical attacks against LGBT people over the past few years.

There have been numerous attacks against LGBT people by vigilante groups, inspired by the far right Russian movement 'Occupy Paedophilia', whose physical attacks on homosexual men in Russia have drawn international condemnation.⁷ Members of this movement, which states its goal to be the prevention of sexual abuse of children and protection of Russian values, are openly homophobic, with some conflating homosexuality with paedophilia.⁸

⁶ In 2009 Soros Foundation-Kazakhstan conducted a survey of nearly 1000 LGBT people, finding that three quarters of respondents (74.5%) who had experienced violence did not report the incident to the police. 'Soros.KZ, 'Unacknowledged and Unprotected: LGBT people in Kazakhstan', 2009, http://www.soros.kz/uploads/user_67/2013_09_04__04_43_19__269.pdf, p. 75

⁷ For example, Human Rights Watch, "Russia: Sochi Games Highlight Homophobic Violence", HRW, 3 Feb 2014, available at: <https://www.hrw.org/news/2014/02/03/russia-sochi-games-highlight-homophobic-violence> (last accessed on 10 Nov 2015).

⁸ The Guardian, How anti-gay groups use 'Russian Facebook' to persecute LGBT people, February 2014, <http://www.theguardian.com/technology/2014/feb/11/russia-violent-anti-gay-groups-vkontakte-LGBTI-sochi>

The group first spread to Kazakhstan in 2013, as copy-cat groups appeared on social networks. Sergey Popravko, leader of a branch of the movement in Ust-Kamenogorsk, told a local reporter, *"I aim to catch (presumed paedophiles) using boys...I will fight gays as well, if they propagate their way of life."*⁹

The movement employs criminal tactics to humiliate gay men. For example, in 2013, A Juvenile Criminal Court in Almaty found five members of *Occupy Paedophilia Almaty* guilty of extortion, sentencing the leader to four years' in a penal colony, and the remaining conspirators to three years.¹⁰ Those convicted had been engaged in kidnapping, and illegally detaining, homosexual men, and forcing them to state their sexual orientation in front of a camera.¹¹ By threatening to disseminate the videotapes online, the members of the movement extorted 100,000 to 300,000 Tenge (up to US\$2,000 at the time) from their victims.¹²

Worryingly, media coverage of this trial, and of other cases of violence perpetrated by *Occupy Paedophilia* members in other cities, covered the details of the cases extremely vaguely, with some reporting that the violent attacks by *Occupy Paedophilia* members targeted individuals engaging in sex with minors under the age of consent; others suggested the movement targeted homosexuals. Inaccurate media coverage reinforces stigmatisation and prejudicial attitudes, ignoring the responsibilities of the media (see *Section 3*).

In April 2015, V. Vinogradov was murdered by two men, Y. Sinkin and D. Protosevich in Ust-Kamenogorsk, allegedly because of his sexual orientation.¹³ In Ust-Kamenogorsk, in the Specialized Inter-District Criminal Court of East Kazakhstan Region, which considered the case, the two defendants confessed that they had murdered Vinogradov, having felt insulted by his sexual orientation, after he came out in front of his drinking companions.

⁹ Adherers of *Occupy Pedophilia* Movement are back to Ust-Kamenogorsk, 13 Sep 2015, available at: http://tengrinews.kz/kazakhstan_news/v-ust-kamenogorsk-vernulis-adeptyi-okkupay-pedofilyay-280764/ (last accessed on 10 Nov 2015).

¹⁰ *Occupy Pedophilia* activists in Almaty have been sentenced to several years in prison, 29 Nov 2013, available at: <http://mir24.tv/news/society/9400828> (last accessed on 10 Nov 2015).

¹¹ *Occupy Pedophilia* activists sentenced in Almaty, 30 November 2013, <http://tengrinews.kz/crime/aktivistov-okkupay-pedofilyay-osudili-v-almaty-246459/>

¹² *Ibid*

¹³ See Shared a Glass. <http://178.90.222.138/news/show/28657>

The court on 13 Aug 2015 found the defendants guilty under paras 5, 7 and 9 of part 2 of Article 99 of Kazakh Criminal Code: murder with exceptional cruelty by a group of persons upon prior conspiracy motivated by hooliganism. The court sentenced the men to 15 and 16 years of incarceration; however, since the Criminal Code lacks the provisions for considering homophobic motivation as an aggravating element to a crime, the murder could not be classified as a hate crime.

The failure of the justice system to guarantee the protection of LGBT people, or provide remedies to redress violation, leaves LGBT people particularly exposed and vulnerable, which is likely to reinforce self-censorship – explored in the next chapter. It is compounded by day-to-day harassment, of which several survey respondents spoke. Maya, an artist, spoke of how she does not hold her girlfriend's hand in the street, and they don't hug each other. Otherwise, they are subject to verbal harassment and are called "damn lesbians" or told "you need a man." Similarly, Aibek, a university student, spoke of harassment at university, after his classmates found out he was gay, on seeing he was a member of LGBT groups on online social networks. He spoke about feelings of social isolation, as students openly discussed his sexuality, pushed him, and told jokes at his expense. "So far no one threatens me, but there is stigmatisation. It is difficult to stand."

The situation is exacerbated by feelings of isolation among LGBT people, the absence of a coordinated LGBT rights movement, and limited social connections between LGBT people. There is no support network for LGBT people. As Tatyana put it: "I am less bothered by harassment. I am more upset with the fact that gays and lesbians themselves don't feel like communicating with each other; they are not united."

Defining discrimination

Under international law, discrimination is understood as:

- (i) any distinction, exclusion, restriction or preference against a person
- (ii) based on a protected characteristic recognised under international human rights law, including sexual orientation and gender identity,
- (iii) which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.*

*See Article 2(2) of the ICCPR; Article 1, ICERD; Article 1, CEDAW and Article 2, Convention on the Rights of Persons with Disabilities. The Human Rights Committee comes to a similar interpretation in General Comment No. 18, paras. 6 and 7.

Discrimination and violation of other rights in practice

“As men and women of conscience, we reject discrimination in general, and in particular discrimination based on sexual orientation and gender identity. Where there is a tension between cultural attitudes and universal human rights, rights must carry the day.”

Ban Ki-moon, United Nations Secretary-General, 2010

In practice, LGBT people in Kazakhstan face pervasive discrimination in their daily lives.

Transgender people face particular challenges in attaining legal recognition of their gender, as recorded in official identity documents, such as passports. In 2009, Kazakhstan passed a new code on public healthcare, which recognised a right to gender reassignment surgery,¹⁴ however, subsequent guidelines regulating gender reassignment which were passed in the aftermath have made it increasingly difficult to exercise this right. Kazakh law now requires individuals to undergo surgery – including both sterilisation and genital reassignment,¹⁵ in order to change their legal identity. If they do not change their legal gender, they face challenges in a range of daily activities, including seeking employment, opening a bank account and even booking travel. Compelling people to undertake invasive surgery in order to change their legal gender violates human rights, compelling transgender people to give up their reproductive rights, as well as undermining the rights to family life and privacy.

Finding and maintaining employment is a major issue for LGBT people, with several interviewees speaking of challenges in this regard. Due to the restrictive processes for changing a person's legal gender describe above, many transgender people struggle to find employment that corresponds to their qualifications due to discrepancy between their legal identity and physical appearance. The only jobs they can find are in the informal economy, where employers do not require identification and pay in cash. For example, despite having a degree in law,

¹⁴ Code on People's Health and System of Healthcare of the Republic of Kazakhstan, 2009, art. 88.

¹⁵ Rules for Medical Examination and Change in Sex of Individuals with Sexual Identity Disorders. Approved by Order # 187 issued by the Kazakh Ministry of Healthcare and Social Development on 31 March 2015.

Misha is currently working as a painter because he does not have personal documents corresponding to his gender identity. Work as a painter does not require an official recruitment process, presenting personal documents, or signing a labour contract. In not signing a contract, his labour social rights are not protected.

Lesbian, gay, and bisexual interviewees also spoke of discrimination in the workplace. Kirill, a lecturer, was fired after his colleagues started suspecting he was gay. Gulnaz, a journalist, described how she was forced to resign after her boss found out her sexual orientation and pressured her to leave. Other respondents reported maintaining successful careers only by remaining silent about their sexual identity when around colleagues.

International Standards on Equality and Non-Discrimination¹⁶

By failing to protect LGBT people, Kazakhstan violates its international commitments to protect people from discrimination. The right to equality and non-discrimination is protected under all major international and regional human rights instruments,¹⁷ including the International Covenant on Civil and Political Rights (ICCPR), to which Kazakhstan is a signatory. Article 2 of the ICCPR obliges states to protect the rights of all individuals within its jurisdiction, ‘without distinction of **any kind**, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’ The list of prohibited grounds, however, is not exhaustive; and the UN Human Rights Committee has interpreted the protections for equality and non-discrimination under the ICCPR to include the grounds of sexual orientation and gender identity.¹⁸ In particular, it recommended that signatory States should guarantee equal rights to all, regardless of their sexual orientation,¹⁹ and has welcomed legislative steps taken by States to comply with this obligation.²⁰

¹⁶ For further information on international standards on equality and non-discrimination, particularly with regard to the rights of LGBT people, see: ARTICLE 19, ‘Traditional Values? Attempts to Censor Sexuality’ (2013) <https://www.article19.org/data/files/medialibrary/36377/LGBTI-propaganda-report-ENGLISH.pdf>

¹⁷ See, for example: Article 7 of the UDHR; Articles 2(1) and 26 of the ICCPR; Article 2(2) of the International Covenant on Economic, Social and Cultural Rights; Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Article 2(1) of the Convention on the Rights of the Child; Article 1(1) and Article 24 of the American Convention on Human Rights, and Article 2 and Article 19 of the African Charter on Human and Peoples’ Rights.

The monitoring bodies for all of the major international human rights treaties, for example the *International Covenant on Economic, Social and Cultural Rights*, *the Convention on the Elimination of All Forms of Discrimination against Women*, and *the Convention on the Rights of the Child*, support the inclusion of sexual orientation and gender identity as protected characteristics in the guarantees for equality and non-discrimination under those instruments.²¹ The European Court of Human Rights reached the same conclusion regarding regional protections against discrimination. It has argued emphatically that “*predisposed bias on the part of a heterosexual majority against a homosexual minority*” cannot amount to sufficient justification for interferences with fundamental human rights.

Discrimination, censorship, and speech which target LGBT people for their sexual orientation and gender identity are often justified in Kazakhstan on the grounds of protecting morality and/or children and upholding Kazakh traditions; however, attempts to silence a whole segment of the population cannot be framed as an issue of morality or the protection of children. These must be called what they are: a violation of human rights.

¹⁸ Toonen v. Australia, HR Committee, Communication No. 488/1992, para. 8.7; and Young v Australia, Communication No. 941/2000, para. 10.4

¹⁹ HR Committee Concluding observations on Chile (CCPR/C/CHL/CO/5, para 16), San Marino (CCPR/C/SMR/CO/2, para 7), and Austria (CCPR/C/AUT/CO/4, para. 8)

²⁰ See, for example: HR Committee Concluding observations on El Salvador (CCPR/C/SLV/CO/6, para. 3(c)), Greece (CCPR/CO/83/ GRC, para. 5), Finland (CCPR/CO/82/FIN, para. 3(a)) and Slovakia (CCPR/CO/78/SVK, para. 4.)

²¹ See: General Comment No. 20, Committee on Economic, Social and Cultural Rights, E/C.12/GC/20, 2 July 2009, para. 32; General Comment No. 2, Committee Against Torture, CAT/C/GC/2, 24 January 2008, para 21; General Comment No. 28, Committee on the Elimination of Discrimination Against Women, CEDAW/C/GC/28, 16 December 2010, para 18; General Comment No. 4, Committee on the Rights of the Child, CRC/GC/2003/4, 1 July 2003, para. 6

National Legislation on non-discrimination²²

“They should pass anti-discriminatory laws, then people will have protection tools”

Sanzhar²³ LGBT activist

Kazakh legislation provides protections for equality and non-discrimination. However, despite guarantees on paper, implementation of this legislation is weak, facilitating the situation described above and leaving all minorities exposed to discrimination, with few opportunities for effective legal remedies available. LGBT people are particularly vulnerable, as the law does not recognise sexual orientation and gender identity as protected characteristics.

Article 14 of the Kazakh Constitution states that *“everyone shall be equal under law and in court”*, providing that *“no one may be discriminated because of origin, social status, official status or property status, sex, race, ethnic background, language, religion, beliefs, place of residence or on any other grounds”*. A progressive reading of this law, in line with international human rights law, would interpret “any other grounds” as including sexual orientation and gender identity.

The Constitution further prohibits ‘any discrimination’ within the workplace (Article 24/3), and forbids *‘advocating war, social, racial, national, religious, class and clannish superiority as well as the cult of cruelty and violence’* (Article 20).

ARTICLE 19 believe these should be interpreted expansively to include sexual orientation and gender identity within the protected characteristics.

²² ARTICLE 19’s analysis of Kazakh legislation is informed by ‘A Preliminary Review of Some Aspects of Inequality and Discrimination in Kazakhstan’, produced by the Kazakhstan International Bureau of Human Rights and Rule of Law, March 2015, available at: <http://ihahr.org/sites/default/files/files/kazakhstan-diskriminaciya-2015-doklad.doc> (last accessed on 10 Nov 2015)

²³ Pseudonyms have been used throughout this report to protect the anonymity of respondents: see Annex 1: Methodology

In addition to constitutional guarantees, a number of laws and regulations prohibit discrimination:

- Article 145 of the Criminal Code prohibits *‘direct or indirect restriction of the rights and freedoms of the individual (citizen) on such grounds as: origin, social status, official status or property status, sex, race, nationality, language, attitude to religion, beliefs, place of residence, membership of public associations or on any other grounds.’*
- The Code of Administrative Offences prohibits acts motivated by the stirring of hate and enmity (or discord) on various grounds. It also prohibits the production, storage, import, transport or dissemination on Kazakhstani media of products containing information aimed at inciting social, racial, ethnic, religious, birth status or ancestry hatred (*rozn*). However, these only prohibit discriminatory content on limited grounds, and do not establish administrative liability for discrimination. In addition, the offence of “stirring discord” can be applied broadly, to unduly restrict the right to freedom of expression. These laws should be reviewed and brought in line with Article 20(2) and Article 19(3) of the ICCPR (explained below).
- Procedural safeguards are included in the Code of Criminal Proceedings and the Code of Civil Proceedings, which prohibit discrimination on the aforementioned grounds during criminal and civil litigation respectively.
- The Labour Code includes a number of provisions prohibiting discrimination on *‘sex, age, physical disadvantages, race, ethnic background, language, property status, social status and official position, place of residence, religion, political beliefs, ancestry or membership of public associations’*; and regulating against this. However, the complaints procedure established for dealing with discrimination is identical to that established for regular administrative procedures, failing to address it as a violation of human rights.
- Finally, a number of anti-discriminatory provisions are also included in the Code of Public Health and Healthcare and associated legislation governing provision of medical care; although these do not specify any protected grounds.

As with the constitutional protections, such legislation should be interpreted to prevent direct or indirect discrimination on the grounds of sexual orientation or gender identity, by recognising sexual orientation and gender identity as a protected characteristic. Moreover, despite legislative protections, Kazakhstan has been criticised for having no regulatory definition of discrimination; which makes it very difficult for law-enforcement and other oversight authorities to interpret and enforce provisions.²⁴

²⁴ Commentary on official report produced by Kazakhstan as a party to International Convention On the Elimination of All Forms of Racial Discrimination and submitted by it to the Committee on Elimination of Racial Discrimination pursuant to Article 9 of the MLKRD, 2004, <http://goo.gl/rICBYH>

2. Obstacles to Freedom of Expression

“Freedom of speech is generally not for us in this country”

Vladimir, transgender respondent

While the right to freedom of expression is constitutionally guaranteed in Kazakhstan, in reality, this right is severely limited due to repressive legislation and practices. Legislative initiatives to promote and protect freedom of expression of minority groups are extremely weak. On the contrary, LGBT people have come under particular attack recently, as parliament has sought to legislate to limit the dissemination of information related to LGBT issues, which target the right to free expression of all people about sexual orientation and gender identity.

The available information indicates that LGBT people struggle to exercise the right to freedom of expression, including both imparting information and receiving information related to LGBT issues. Interviewees reported a range of concerns, including direct censorship, blocking of online content; indirect censorship by media outlets (see Section 3); and self-censorship, relating to stigmatization and isolation of LGBT people. Despite constitutional guarantees to the right to free expression, an overwhelming majority of interviewees (88%) described freedom of expression as “impossible in our country”.

Only a quarter (24%) of interviewees said they could freely express their views on issues related to sexual orientation or gender identity, with the remaining three quarters saying they could not, as they felt threatened and insulted and their privacy not respected.

Two thirds of respondents (67%) reported retracting their opinions on issues related to sexual orientation or gender identity, following an argument/debate with an interlocutor. This was usually by arguing that sexual orientation and gender identity was sodomy, a perversion, or a disease, demonstrating the hostility and aggression faced by LGBT people in seeking to express themselves.

Legislative framework and media environment

The ICCPR protects the right of all people to seek, receive, and impart information of any form, including political discourse, commentary on one's own and on public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching, and religious discourse. Importantly, the right protects expression that others may find deeply offensive – as reflected in General Comment No. 34 of the UN Human Rights Committee.²⁵

At the same time, freedom of expression is not an absolute right and may be subject to limitations under exceptional circumstances. Article 19(3) of the ICCPR, provides that any limitation on the right to freedom of expression must meet a “three-part test”: any restriction must be provided for by law and pursue one of an exhaustive list of legitimate aims, namely: respect for the rights or reputations of others, public order, public health or morals, or national security, and thirdly be necessary in a democratic society. Additionally, under Article 20(2) of the ICCPR, States are obliged to “prohibit” by law any *“advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.”* ARTICLE 19 considers that States should interpret the characteristics of nationality, race and religion in Article 20(2) expansively, and not treat differently analogous advocacy of hatred based on sexual orientation or gender identity.

Freedom of speech is guaranteed by Article 20 of the Kazakh Constitution, which forbids censorship and ensures the right to freely receive and disseminate information by any means not prohibited by law. This in itself falls short of the standards established in Article 19 of the ICCPR, by failing to state that any restriction included in the law must be necessary, for the respect of the rights or reputations of others and for the protection of national security or of public order (ordre public), or of public health or morals. The same article also imposes restrictions on the right to freedom of expression when it comes to: *“Propaganda of, or agitation for, the forcible change of the constitutional system, violation of the integrity of the Republic, undermining of state security, and advocating war, social, racial, national, religious, class and clannish superiority as well as the cult of cruelty and violence.”* This is much broader than the prohibition required by Article 20(2).

²⁵ UN Human Rights Committee, General comment No. 34, Article 19: Freedoms of opinion and expression <http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>

The right to freedom of expression is further regulated by over 10 different laws and subordinate acts, including the Law on Mass Media, the Law on TV and Radio Broadcasting, the National Security Law, the Law on State Secrets, the Law on the Leader of the Nation, and the Civil, Criminal and Administrative Codes. These laws contain restrictions and obstacles to freedom of expression, which are abused by the Kazakh authorities to limit dissenting, critical and minority voices. Particularly concerning are criminal libel and defamation laws, overbroad laws criminalizing the incitement of social, national, clan, racial, or religious discord (explored in chapter 3); and criminal charges for “spreading false information.”²⁶ Legislation confers sanctions on offences, providing the government with an effective tool to control expression inside the country. In this context, the media environment is dominated by pro-government media, with independent outlets subject to judicial and administrative harassment.²⁷

There have recently been worrying attempts by the Kazakh parliament to pass legislation which would severely restrict the right to disseminate information regarding LGBT issues, similar to Russia’s infamous law prohibiting “the promotion among children of non-traditional sexual relations”²⁸ – the so-called “homosexual propaganda ban”. In February 2015, the Kazakh parliament approved a draft Law ‘On the Protection of Children Against Information, Damaging Their Health and Development.’ Although a full version of the draft bill was never made public, one provision available online would have prohibited the dissemination of information “propagandizing non-traditional sexual orientation” to minors.²⁹ In May, however, the Kazakh Constitutional Council recognized the draft law as unconstitutional, on the grounds that it contained “vague and ambiguous definitions and terms,” and sent it back to Parliament for further discussion.”³⁰

²⁶ Freedom House, ‘Freedom of the Press 2015: Kazakhstan’, <https://freedomhouse.org/report/freedom-press/2015/kazakhstan>

²⁷ Ibid

²⁸ Federal law #135-FZ of 29 June 2013 On the introduction of amendments to Article 5 of the Federal law “On the protection of children from information harmful to their health and development” and diverse legislative acts of the Russian Federation aimed at protecting children from information which propagandises the rejection of traditional family values. <http://www.rg.ru/2013/06/30/deti-site-dok.html> (accessed 05/11/2015)

²⁹ Human Rights Watch, ‘Kazakhstan: Anti-Gay Laws Found Unconstitutional’, May 28th 2015, <https://www.hrw.org/news/2015/05/28/kazakhstan-anti-gay-laws-found-unconstitutional>,

³⁰ “Draft Law on prohibition of gay propaganda declared unconstitutional in Kazakhstan”, 27 May 2015, available at: <http://informburo.kz/novosti/zakon-o-zaprete-gey-propagandy-priznan-nekonstitucionnym-5321.html> (last accessed on 11 Nov 2015).

This decision is concerning, as this decision was not made on the basis that the draft law violates Constitutional guarantees of non-discrimination and freedom of expression. Indeed, although the current status of the draft law is unclear, there are concerns that it may resurface, following statements by the Ministry on Investment and Development that the law will be analysed and further developed.³¹

If passed, this law would violate the rights to freedom of expression and equality of LGBT people, by restricting the flow of information from and about LGBT people, preventing them from expressing themselves and denying them opportunities to assert other fundamental rights – such as the right to education and the right to health. Additionally, it would also violate the rights of all people to openly discuss issues relating to sexual orientation and gender identity, and prevent them accessing information on a wide range of related concerns. Attempts to justify these bans on the grounds of protecting children and upholding morality contradict the principles of the universality of human rights, stemming from the fact that the rights contained within the Universal Declaration of Human Rights represent a coherent and universally agreed-upon framework for protecting the rights of all human beings, and cannot be denied to a whole section of the population, due to societal prejudices.

This is reinforced by responses of international human rights mechanisms to prohibitions on “homosexual propaganda”. The UN Human Rights Committee found in a 2012 decision that the prohibition of “homosexual propaganda” in Ryazan, Russia violated the right to freedom of expression. The decision affirmed that the right to equality protects individuals on the basis of their sexual orientation and gender identity, and places a positive obligation upon States to respect the freedom of expression rights of LGBT people. The decision finds support in the jurisprudence of the European Court of Human Rights and Inter-American Court of Human Rights, the reports of the Office of the High Commissioner for Human Rights, UN treaty monitoring bodies and UN special mandates, as well as in declarations of international and regional political bodies.³²

³¹ “Draft law on protection of children from undesirable information will be further developed in Kazakhstan”, 27 May 2015, available at: <http://www.zakon.kz/4715287-zakonoproekt-ozashhite-detejj-ot.html> (last accessed on 11 Nov 2015).

³² ARTICLE 19, ‘Traditional Values? Attempts to Censor Sexuality’, March 2013, <https://www.article19.org/data/files/medialibrary/3637/LGBTI-propaganda-report-ENGLISH.pdf>

Censorship of LGBT People, Issues and Information

A number of respondents to our survey raised concerns about censorship both on and offline. There are worrying cases where broad criminal and civil provisions, ostensibly with legitimate aims (for example the protection of reputation, or prevention of incitement to hatred), have been abusively applied to censor speech relating to issues around sexual orientation and gender identity.

One of the most high profile cases of censorship in Kazakhstan in recent years concerns an advertising poster for a gay club in Almaty, portraying a kiss between two 19th century cultural icons, Alexander Pushkin, a Russian poet, and Kurmangazy Sagyrbaiuly, a Kazakh composer. The poster was designed by Havas Worldwide Kazakhstan, an advertising agency, as a submission to the Central Asian Advertising Festival, and was published on social media networks in August 2014 by a member of staff at a competing agency. The publication of the poster caused an uproar on social media, resulting in several lawsuits filed against the agency, and almost \$150,000 awarded against the agency for “moral damages.”

An initial claim was filed by the Almaty City Administration, which filed a class action, arguing that the poster was “unethical” and “*offends the image of these great artists and violates widespread moral norms and behaviours, given that it shows non-traditional sexual relations, which are unacceptable to society.*”³³ On 24th September 2014, the Almaty Specialized Inter-district Administrative Court ruled that the advertising agency Havas Worldwide Kazakhstan had violated the Law On Advertising and obliged the agency to pay a fine of 185,200 Tenge (US\$690), and its director Dariya Khamitzhanova to pay a fine of 129,640 Tenge (US\$480).

Then, in September 2014, 34 students and professors, working and studying at a national musical conservatory named after Kurmangazy, filed a class action lawsuit for the protection of their honour, dignity and business reputation against the advertising agency. They argued that the poster insulted both the honour and dignity of Pushkin and Kurmangazy’s descendants and of “all people not

³³ Human Rights Watch, ‘Kazakhstan: Lawsuits Over Same-Sex Kiss on Poster’, October 2014, <https://www.hrw.org/news/2014/10/01/kazakhstan-lawsuits-over-same-sex-kiss-poster>

indifferent to their art”.³⁴ Each of them sought one million Tenge in recovery of moral damage. On 28 October the court ruled the satisfaction of their claims, ordering the agency to pay 34 million Tenge (around US\$126,000), causing it to become financially bankrupt.

Both judgments are a clear violation of the right to free expression. The scope of the right to freedom of expression includes both artistic representations and commercial advertising, and encompasses provocative expression that may be offensive. The Court's finding that the image impacted on those who respect Kurmangazy seems particularly tenuous. Moreover, restrictions on expression premised upon the concept of “public morals” cannot rely on discriminatory precepts which justify discrimination and promote intolerance against people, including on the basis of sexual orientation or gender identity.

³⁴ Ibid

International Standards on Blocking of Online Content*

ARTICLE 19 believes that online blocking is never justified. It is an ineffective tool (there are almost always ways to circumnavigate it). Meanwhile international human rights bodies have expressed their deep concern about blocking measures, arguing that mandatory blocking of entire websites, IP addresses, ports, network protocols or types of uses (such as social networking) is an extreme measure – analogous to banning a newspaper or broadcaster – which can only be justified in accordance with international standards.

The UN Special Rapporteur on Freedom of Expression has, however, recognised that website blocking may be justified in limited circumstances in order to deal with categories of content prohibited under international law, namely: child pornography, incitement to commit genocide, advocacy of national racial or religious hatred that constitutes incitement to discrimination, hostility or violence, and incitement to terrorism.

Nonetheless, blocking measures must always comply with the three-part test under Article 19(3) ICCPR and established minimum criteria that must be met in order to justify website blocking under international law, namely:

- Blocking should be clearly laid out by law;
- Any determination on what content should be blocked must be undertaken by a competent judicial authority, or a body which is independent of any political, commercial, or other unwarranted influences;
- Blocking orders must be strictly limited in scope in line with the requirements of necessity and proportionality under Article 19 (3);
- Lists of blocked websites, together with full details regarding the necessity and justification for blocking each individual website, should be published;
- An explanation should also be provided to the affected websites as to why they have been blocked.

*For further information, see: Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Report to the General Assembly A/66/290, 10 August 2011, available at <http://www.ohchr.org/Documents/Issues/Opinion/A.66.290.pdf>; and UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Report to the Human Rights Council, A/HRC/ 17/27, 16 May 2011, paras. 70 and 71 available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf

Respondents also spoke of online censorship. The Kazakh government has extensive powers to block and filter online content, and several respondents reported difficulties accessing information on LGBT issues – which they attributed to the sites being blocked.

In 2014, Kazakhstan passed legislation enabling the office of the Prosecutor General to shut down websites or block access to pages without a court order if they contain “illegal material.”³⁵ Courts may also issue orders for the suspension or closure of websites or internet resources, all of which are considered to be ‘media outlets’ under Kazakh law.

Internet service providers (ISPs) are obliged to remove material at the request of the prosecutor’s office, without a court order, or by order of the court, although there is very little transparency around the process, including regarding which sites or materials have been blocked and on what grounds.

In 2015, Freedom House noted multiple incidences of blocking and filtering of web content in Kazakhstan, predominantly on the grounds of preventing the dissemination of terrorist material; however, there is evidence of websites being blocked seemingly without court decisions, or a prosecutorial request.³⁶

Multiple survey respondents referred to regular blocking of LGBT websites and forums, with transgender interviewees noting particular challenges in accessing information on issues relating to gender identity. Three transgender interviewees noted that it had taken them almost six months to find a platform where they could search and exchange information on this topic. However, while blocking of online content is clearly an issue within Kazakhstan, given the lack of transparency around how and when sites or pages are blocked, it is extremely difficult to verify the practice of blocking LGBT sites or content. Moreover, during the course of this study, researchers were able to access sites interviewees cited as previously blocked.

³⁵ Law of the Republic of Kazakhstan of 23 April 2014, No 200-V, ‘On the introduction of changes and additions to several legislative acts of the Republic of Kazakhstan related to activities of organs of interior affairs’, http://online.zakon.kz/Document/?doc_id=31539059

³⁶ Freedom House, Freedom on the Net 2015, <https://freedomhouse.org/report/freedom-net/2015/kazakhstan>

There is a clear need to better understand the obstacles to LGBT people accessing information online. This could involve multiple factors, including extrajudicial blocking of information, a lack of material available in Russian and Kazakh languages, or low levels of online literacy among those seeking information. However, the matter is complicated by the lack of transparency around blocking procedures. In line with international standards, the government of Kazakhstan should refrain from all extra-judicial blocking of online information, and ensure reliable information is available on which sites have been blocked and on what grounds. This would contribute to improving access of LGBT people to information on sexual orientation and gender identity.

One interviewee also reported a technical attack against an LGBT site, and spoke of how an LGBT discussion group on VKontakte, a popular social media site in Kazakhstan was broken into, and the content replaced with materials on Islam.

Self-Censorship

During the course of the survey, the majority of respondents spoke of resorting to self-censorship to avoid discrimination or violence. Over half of interviewees (58%) reported that they do not disseminate information about LGBT issues, because of self-censorship or fear of violence. A minority of the respondents said they did disseminate information, but were aware of the risks of being insulted or threatened when doing so. Just less than half of interviewees reported having difficulties in expressing their views (42%). Only a quarter (24%) reported not facing such difficulties; however, of these respondents, half reported having no such difficulties because they simply do not speak of LGBT issues in order to avoid conflicts.

One of the key spaces for expression in Kazakhstan is social media, given the lack of a strong independent media sphere. However, LGBT people also face difficulties speaking openly about LGBT issues and exchanging information on social media, with just under half (42%) of interviewees feeling threatened in social networks. Half of respondents (51%) spoke of concealing their sexual orientation or gender identity online, in order to avoid harassment or intimidation from friends and colleagues. At the same time, in order to be able to participate in online discussions the same amount of respondents (51%) reported having more than one account, using pseudonyms to participate in online discussions on LGBT issues. Just less than one fifth (18%) of interviewees communicate on LGBT forums without using pseudonyms or being anonymous. Various reasons were given for concealing identity online – the most frequent being fear of social stigma, intimidation or attack.

According to Timur, an activist, things are better for LGBT people than 10 years ago, probably because of a new generation of people who studied abroad. In his experience, Astana residents are not interested in an individual's personal life unless they demonstrate it publicly: "if you don't provoke, don't challenge, no one will do anything to you, no one cares about you." Another respondent, Pavel, a journalist, was concerned that speaking of LGBT issues would provoke a tough response from the authorities, resulting in even greater shrinkage of space available for LGBT people, for example the passing of a law on "homosexual propaganda", or re-criminalisation of homosexuality.

“We don’t trouble anyone and let no one trouble us. Why are you bringing this up?! I personally don’t want human rights lawyers to protect us. Our principle is that it is excellent to live as if we don’t exist. My identity is my personal business”

Pavel

However, one respondent alluded to concerns of influencing others’ sexuality: Valentina, a musician, spoke of trying her best to conceal her sexual identity: she is not a member of LGBT online groups and never posts about LGBT issues. She says that her online friends include students she taught music, and she is afraid of influencing them: *“I’m afraid that I can influence their choice; I’m afraid that I can influence their sexual identity.”* The premise that she could propagate her sexual orientation is absurd; however it is a worrying manifestation of how LGBT people censor their sexuality having internalised concerns about sexual orientation and gender identity being contagious, as expressed by political figures and in the media.

Media coverage is explored in greater detail in the next chapter; however, interviewees also spoke of censoring themselves in their dealings with the media. This is linked to a deep mistrust of the media, and fear that journalists will deliberately misrepresent LGBT issues, in order to sensationalize the topic. Over two thirds of respondents (67%) would not speak about LGBT issues on the media as “it is very dangerous.” Just 55% of interviewees would speak on the media anonymously, as others did not trust journalists to maintain anonymity or report reliably on conversations.

3. Public Discourse around LGBT People

Public discourse around LGBT people, propagated by traditional media, by public officials, and on social media, is often negative, discriminatory, or sensationalist. Such speech serves to reinforce negative attitudes towards LGBT people, reinforcing self-censorship. Tackling this requires a combination of positive policy measures, aimed at enabling factual and sensitive discussion of LGBT issues, while ensuring a clear legal framework that prohibits advocacy of hatred that constitutes incitement to hostility, violence or discrimination, including on the grounds of sexual orientation and gender identity.

Regulating “hate speech”: standards and legislation

There is no universally accepted definition of the term “hate speech” in international law. The term is usually used to refer to expression that is abusive, insulting, intimidating or harassing and/or which incites to violence, hatred or discrimination against groups identified by a specific set of characteristics. For example, the Council of Europe Committee of Ministers has indicated that the term “hate speech” includes:

“[A]ll forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility towards minorities, migrants and people of immigrant origin”³⁷

³⁷ Council of Europe Committee of Ministers, Recommendation, No. R (97) 20 of the Committee of Ministers to Member States on “Hate Speech”, October 1997, http://www.coe.int/t/dghl/standardsetting/media/doc/cm/rec%281997%29020&expmem_EN.asp

The lack of a consensus regarding definition of “hate speech” is also reflected in domestic legislation. In many States, prohibitions are often formulated in broad terms, which are impermissible under international law since they violate the right to freedom of expression. It is only in very narrow circumstances that States are required by international human rights law to prohibit the most severe forms of “hate speech” – the advocacy of hatred that constitutes incitement to hostility, discrimination or violence.

It is essential, however, that any legislation regulating such speech conforms to international standards on acceptable limits to the right to freedom of expression and information. Establishing whether expression reaches the prohibited threshold under Article 20(2) of the ICCPR is a difficult process, however, requiring analysis of the expression on a case-by-case basis, looking at the context, the position of the speaker, their intent, the context of their message, the audience of their message and the means of dissemination.³⁸

Where it is clear that expression constitutes incitement to discrimination, hostility or violence (in line with the test), the next step is to determine appropriate sanctions. The selection of sanctions should be guided by an assessment of the severity of the offence. ARTICLE 19 believes that it is preferable to employ civil and administrative law sanctions, given the necessity test (Article 19(3) of the ICCPR), which requires that the least intrusive effective remedy should be employed when restricting speech.³⁹ Moreover, the experience of many jurisdictions

³⁸ This test was proposed by ARTICLE 19, ‘Prohibiting incitement to discrimination, hostility or violence’, December 2012, <https://www.article19.org/data/files/medialibrary/3572/12-12-01-PO-incitement-WEB.pdf> ; and incorporated into the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence of the Office of the High Commissioner of Human Rights, http://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf

³⁹ ARTICLE 19, ‘Prohibiting incitement to discrimination, hostility or violence’, December 2012 op.cit.

shows that civil and administrative law sanctions are better suited as responses to the harm caused by “hate speech.”⁴⁰ Only in the most serious cases of incitement, when the authorities conclude that the particular incitement has reached the highest level of severity, should States impose criminal sanctions.

Prohibitions that unnecessarily censor contentious viewpoints, even where these viewpoints are offensive, are often counter-productive to promoting equality for LGBT people, and fail to address the underlying social roots of the kinds of prejudice of which homophobia and transphobia are symptomatic. In most instances, equality is better promoted through positive measures, aiming to increase understanding and tolerance, rather than censorship of views perceived as injurious to LGBT people or any other community.⁴¹

In Kazakhstan, Article 174 of the Criminal Code contains provisions prohibiting the incitement to social, national, ethnic, racial, class or religious hatred. Gender identity and sexual orientation are not included in the list of grounds for which incitement is prohibited. Additionally, paragraph 3 of Article 20(2) of the Kazakh Constitution prohibits propaganda of social, racial, ethnic, religious, birth status and ancestry superiority, as well as the cult of cruelty and violence. These two provisions, theoretically, could be interpreted to prohibit the incitement of hatred, and propagation of the cult of cruelty and violence targeting LGBT people; however, given the lack of protections for LGBT people in other laws, this seems unlikely.

The purpose of prohibiting incitement, in accordance with international law, should be to protect minorities and vulnerable groups, but the vague provisions included in Kazakhstan’s legislation, fall far short of the high threshold for ‘incitement to hostility, discrimination or violence’ discussed above. This allows for inconsistent, or even counter-productive, application. Indeed, Kazakhstan has a track record of applying criminal incitement provisions in order to restrict the freedom of expression of critical groups, and to persecute minorities.⁴²

⁴⁰ For example, in Brazil, it has been documented that criminal law has not been efficient due to institutional bias among law enforcement agencies, while sanctions have been levied effectively in civil proceedings. See, Tanya Hernandez, *Hate Speech and the Language of Racism in Latin America*, 32 U. Pa. J. Int’l L. 805 2010-2011

⁴¹ For more information, see: ARTICLE 19, ‘Responding to Hate Speech against LGBT people’, October 2013

⁴² See for example, Human Rights Watch, ‘World Report 2015: Kazakhstan’, <https://www.hrw.org/world-report/2015/country-chapters/kazakhstan>

Discourse on LGBT issues by public figures

Media monitoring has established that some of the worst examples of homophobic speech in Kazakhstan are propagated by government officials – including ministers and parliamentarians. Such speech by influential public figures is particularly concerning, as they are able to influence public decision and establish rhetorical frameworks through which LGBT identities are perceived and expressed.

Examples of discriminatory speech by politicians and public figures include:

- Calls by parliamentarians of the ruling Nur Otan party to criminalize homosexuality, which they describe as immoral and a crime against humanity.⁴³ One MP, Aldan Smayil stated: *“If we don’t take actions now, we will not stop this [homosexuality]. There are now 20 gay clubs in Almaty and 4 in Astana! It is shameful!... We should pass a law, which will criminalise them.”*⁴⁴
- A characterization of LGBT identities as a neo-colonial plot designed to reduce the Kazakh population, by Vladislav Kosarev, General Secretary of the Communist People’s Party of Kazakhstan, which currently holds 7 out of 98 seats in parliament. The statement was made to a journalist writing about LGBT people in Kazakhstan. *“Why are you trying to make people think that there are actually such poor relationships in our country? Homosexuality should not exist. It should be recognised as a deformation of human consciousness... it is planting misanthropic relationships, which neo-colonialism is pushing in all countries in order to reduce the population.”*⁴⁵
- An analogy between LGBT identities and fascism, to illustrate how ideas abominable to society can be legitimized, put forward by Imangali Tasmagambetov, then Mayor of Astana (now Minister of Defence) at a forum of educators in August 2014. He was urging the need to be vigilant against online technologies that seek to brainwash children and normalize ‘amoral’ ideas:

⁴³ Kazakhstan: Parliament Becomes Scene of Homophobic Rants, 28 May 2013, <http://www.eurasianet.org/taxonomy/term/3882>

⁴⁴ In Kazakhstan, they suggest imprisoning gays and lesbians, 24 May 2013, <http://www.rosbalt.ru/exussr/2013/05/24/1132907.html>

⁴⁵ See The Kazakh Gays Complaining About Their Uneasy Life, 13 March 2013, <http://tengrinews.kz/show/kazahstanskije-gei-jaluyutsya-na-neprostuyu-jizn-230029/>

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- *“...given modern information technologies [it is possible to] both generate and destroy moral values, especially among the younger generation... This is how it works: a phenomenon, which was earlier unacceptable, is brought up for discussion. It is masked by arguments about freedom of speech, freedom of expression and national interest. After some time... people then perceive [this phenomenon] as something regular and appropriate. Ultimately the public... accepts new laws protecting something, which was absolutely unbelievable some time ago. You can remember fascism that led to war and death camps». He then continued to cite “non-traditional sexual orientation”, as a prime example that has been entirely normalized in many Western States. “It has not just become a political standard in some developed countries. It has been so transformed that the senators of California State approved a mandatory training course to study the history of successes made by gays and lesbians. I assume that you can see how it is “promoted” on international mass media. It is reasonable to ask: what is next?”⁴⁶*

Where such speech clearly constitutes incitement to hatred, discrimination or violence, sanctions should be employed in line with the standards and recommendations outlined above. However, if speech does not meet the threshold to be classified as hate speech, banning the expression of such opinions is likely to be counter-productive, reinforcing negative opinions of LGBT people, rather than promoting equality. As such, proper consideration of the facts of the individual case is essential.

In any case, as recommended in the *Camden Principles on Freedom of Expression and Equality*, pressure should be put on politicians and other leadership figures in society to refrain from statements that promote discrimination or undermine equality.⁴⁷ Instead, they should be encouraged to use the platforms, afforded to them by their positions, in order to promote tolerance, including by contesting discriminatory statements or behaviour.

⁴⁶ *Tasmagambetov Discovered a Brainwash Conspiracy*, August 2014, <http://news.nur.kz/kk/327719.html>

⁴⁷ ARTICLE 19, *The Camden Principles on Freedom of Expression and Equality*, April 2009, <https://www.article19.org/data/files/pdfs/standards/the-camden-principles-on-freedom-of-expression-and-equality.pdf>

Media portrayals of LGBT people

“Why push the public to make a decision about whether LGBT people are good or bad? You should just provide credible and neutral information so that people choose how to feel about LGBT [issues]... People should just be informed”

Timur

Mass media coverage of LGBT stories and issues is rare, but where it does exist, it is often negative or sensationalist. Interviewees complained of a lack of professionalism among journalists covering these issues, resulting in distortion of facts or censorship of key points made by LGBT people. Consequently LGBT people are unwilling to speak to the media, reinforcing the cycle of censorship and self-censorship outlined above.

The brief survey of online publications conducted as part of this research found that the majority of publications on LGBT issues are sensationalist, aimed at grabbing headlines, with few examples of serious professional journalism. There are cases of independent media outlets covering LGBT issues in a more sensitive manner, for example some of the coverage of a symbolic marriage ceremony between two lesbian women in Karaganda.⁴⁸

Language used in mainstream media articles was, however, typically reflective of negative and discriminatory societal attitudes, rather than challenging them in a factual and sensitive manner.

In May 2015, as Kazakhstan sought to secure its bid to host the 2022 Winter Olympics, website zakon.kz published an article titled *10 Athletes Who Will Not be Welcome in Kazakhstan*,⁴⁹ listing LGBT athletes from around the world. The text itself was not openly inflammatory, listing LGBT sportsmen and sportswomen from around the world; however, by failing to analyse or challenge why these sportsmen and sportswomen would not be welcome, the text served to reinforce this prejudice. Moreover, the title was replicated by some media, with text endorsing the message, further reinforcing such negative attitudes. Nur.kz, a popular online portal, went further and used the derogatory and homophobic term *pediki* as a tag for the story.

⁴⁸ See *Different Marriage: She and She*. <http://www.voxpopuli.kz/main/1074-drugaya-svadba-ona-i-ona.html> (accessed 05/11/2015)

⁴⁹ <http://www.zakon.kz/4665051-10-sportsmenov-kotorym-v-kazakhstane.html>

Even where LGBT people have engaged with media to promote more informed and balanced coverage, the results have been disappointing. In April 2015, women's entertainment website comode.kz published an article titled *Sex Affirmation: How I Became a Man*.⁵⁰ A transgender man agreed to give an interview provided that he could approve the article before publication. Despite discussing challenges faced by transgender people in Kazakhstan during the interview, the article focused on what toilet he used, where he bought his clothes and what his name was prior to gender reassignment. Although he refused to approve the article, it was published. Members of Kazfeminita, an initiative group working on promoting LGBT rights, who had also commented on challenges faced by transgender people prior to publication, contacted the editor-in-chief requesting the withdrawal of the publication. While the editors withdrew the comment made by the representative of Kazfeminita, the publication remained online. Survey participants who had participated in media talk shows or given interviews to journalists similarly reported their dissatisfaction with the media. Key points they wanted to make on the media in front of the public were not made as they were cut off. Their statements were taken out of context ending up with tenuous report.

Media in Kazakhstan tend to report on public affairs concerning LGBT people in a discriminatory or insensitive manner. For example, while the media barely covered the case of the identity-motivated murder of a gay man in Ust-Kamenogorsk (referred to in section one), in 2013 Kazakh media reported widely on the trial of a woman who was charged with the murder of her partner, another woman.⁵¹ As noted above, the couple's wedding had previously been reported in the press; and the media covered each court session in detail, focusing on issues of their personal lives. Domestic violence within heterosexual couples does not receive the same level of attention in the media as that which occurs in LGBT couples. In the first nine months of 2015, the General Prosecutor's office registered 163 murders of women,⁵² and while some media have written of the problem of domestic violence in general, this rarely focuses on individual cases of violence.

⁵⁰ <http://comode.kz/post/relations/smena-pola-kak-ja-stala-muzhchinoj/>

⁵¹ See *New Details of Murder of the Lesbian Family in Astana*. <http://tengrinews.kz/crime/novyie-podrobnosti-ubiystva-v-seme-lesbiiyanok-v-astane-255370/>

⁵² Activists of the Occupy Pedophilia Movement turn out to be extortionists, 13th May 2013, <http://kz.mir24.tv/news/21383>

Similarly, as noted above, some coverage of Occupy Paedophilia has conflated homosexuality with paedophilia: for example, one publication reported on how the movement sought to combat paedophilia, then wrote of how the movement targeted gay men,⁵³ without pointing out that homosexuality is a sexual orientation, is not criminal, should never be punished, and as such is incomparable with paedophilia. Additionally, some media outlets reproduce extremely offensive speech by politicians and other opinions leaders (see examples below) which, while perhaps being permissible speech under international law, is nevertheless offensive, and serves to further marginalise LGBT individuals in public discourse. Unless such speech constitutes advocacy of hatred that constitutes incitement to hostility, discrimination or violence, the criminalisation of such speech, or banning media from reproducing it, would contradict the principle of free speech. Nevertheless, in such incidences, as in those outlined above, it is important that media outlets recognise their moral and social responsibility as opinion formers, and understand how such speech might encourage discrimination, and ensure that speech is reported on in a more ethical manner, including, where appropriate, an analysis of why such speech would be considered discriminatory or intolerant.

Much of the media's approach to covering LGBT issues can be explained by a need to attract readers. As Inna, a journalist put it: *'The most important [thing] is to get the public interested in the report. The more intimate a report is, the more clicks it gets; and the higher the rating. Everyone wants a high rating. The higher the rating, the more advertising.'* This focus of journalists towards ratings comes at the cost of paying attention to media ethics and professionalism, with little focus on the quality and ethical stand of the report. Facts are often misquoted or misrepresented, with no real opportunity for affected individuals to exercise a right to reply or correction.

The result of this is to reinforce mistrust between the LGBT community and the media; which in turn prevents the dissemination of informative, fact-based information on LGBT identities and issues. Additionally, the situation deprives LGBT people of an avenue where they could expose the challenges they face and

⁵³ Activists of the Occupy Pedophilia Movement turn out to be extortionists, 13th May 2013, <http://kz.mir24.tv/news/21383>

campaign for their rights. Serik, a survey respondent, explained how transgender people could not challenge the inadequate healthcare they receive through the media, since they are ‘perceived as something exotic, like animals in the zoo.’ A second respondent, Vladimir, argued that the problem with poor government services and media were intricately linked. In his opinion, government officials are unaware of issues facing transgender people, and the media do not report on this. At the same time, ensuring better media coverage will require political will, given the weakness of independent non-state media. “If the government policies aim at supporting transgender people, then the mass media will report in ... [a more sensitive] manner”.

While much of the media on LGBT people would not reach the threshold of Article 20(2) of the ICCPR, qualifying as “hate speech”, there is clearly a need to increase quality coverage of LGBT issues, as a first step to challenging prevalent negative rhetoric and prejudices.

Civil Society discourse on LGBT people

Although a number of civil society organisations in Kazakhstan have engaged extensively in the promotion and protection of the rights of LGBT people, there are numerous examples of human rights defenders who fail to respect the universality of human rights, and fail to uphold the principles of non-discrimination.

Interviews with human rights defenders conducted as part of this project demonstrated prejudicial attitudes among some representatives of NGOs. A majority of civil society representatives interviewed stated that they did not wish to work with LGBT people; although some mentioned they would be prepared to do so, particularly if funding was available.

Interviewers recorded incidences of homophobic language, with a number of respondents referring to LGBT identities as a deviation or illness that required treatment. One respondent denied that LGBT people face discrimination with Kazakhstan, and said that she could not work with LGBT people, as would not want to “propagate” this way of life.

The failure to uphold the right of non-discrimination in enjoying human rights, in this case including the right to free expression, the right to access to information and the right to freedom of peaceful assembly, but to cite a few, is an indicator of the work ahead inside the human rights community in Kazakhstan.

Conclusion

States are obliged to ensure an environment in which the fundamental rights of all citizens, including the right to freedom of expression, can be respected. In Kazakhstan, despite constitutional guarantees of freedom of expression, this right is repeatedly violated, due to broad, contradictory, or simply repressive legislation, a lack of procedural safeguards, and an absence of political will.

LGBT people face particular challenges in exercising this right, arising from several inter-related reasons. ARTICLE 19's research found evidence of attempts to prevent censor speech and other expression related to sexual orientation and gender identity on the grounds of protecting morals or traditional values, an reasoning which is clearly discriminatory, and violates international human rights standards on equality and non-discrimination.

A second problem is self-censorship: LGBT people feel insufficiently protected to exercise the right to expression. This is related to societal discrimination, harassment and violence, reinforced by prejudiced and homophobic statements by public figures, proposed discriminatory legislation and a failure by authorities to properly respond to homophobic incidents, all of which serve to legitimize negative attitudes and reinforce self-censorship.

The situation is exacerbated by the absence of platforms where LGBT people can publicly express themselves or access relevant information around the issues they face. Aside from a few positive examples, media coverage tends to be sensationalist, if not openly homophobic and discriminatory. This has created an atmosphere of distrust between LGBT people and media workers, further reinforcing practices of self-censorship. It is essential that LGBT people can rely on the broader support of civil society to promote expression, as part of anti-discrimination networks, challenging intolerance and prejudice on any grounds and promoting the universality and indivisibility of human rights **for all** people.

This situation not only deprives LGBT people of the right to express themselves, but also severely restricts the flow of information on issues related to sexual orientation and gender identity. This deprives all people of the right to information; and is particularly concerning for LGBT people who struggle to access information on healthcare and education, further violating their rights to health and education.

Annex 1: Methodology

This study focuses on challenges faced by LGBT people in Kazakhstan when exercising their right to free expression. It is based on data collected from interviews with 33 members of the LGBT community, all aged 16 or older: 15 females, 11 males and 7 transgender people.

Respondents came from six cities in Kazakhstan: Astana, Almaty, Karaganda, Semey, Ust-Kamenogorsk, and Shymkent. All knew the purpose of the research, and were interviewed on the condition of anonymity in this publication: pseudonyms are used in the report to protect the anonymity of participants.

Research also relied on monitoring of popular media sites, social networks and political speeches, and analysis of Kazakhstan's domestic legislation. Local human rights defenders were interviewed in free form.

The research is not intended to be comprehensive, and constitutes pilot research on which we hope to build in the future. It includes a limited sample of interviewees from urban areas of Kazakhstan, while monitoring of media relies on a narrow pool of publications, observed over a 6 month time frame. Nevertheless, it provides an illustration of the challenges faced by LGBT people across the country in exercising their right to freedom of expression.

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